88-1108

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor.

NEW YORK TYPOGRAPHICAL UNION NO. 6

Petitioner,

against

ROYAL COMPOSING ROOM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. When evaluating the "necessity" of the modifications to a collective bargaining agreement required under 11 U.S.C. §1113(b) and (c) as a prerequisite to a debtor's application to reject that agreement, should a court define "necessity" as requiring only "essential" modifications needed to achieve the short-term goal of preventing the debtor's liquidation, see Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074 (3d Cir. 1986), or should it define "necessity" as requiring "necessary, but not absolutely minimal, changes" needed to achieve the longer-term goal of a successful reorganization, see Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987).

2. (a) When evaluating the "necessity" of a debtor's proposed modifications pursuant to 11 U.S.C. §1113(b) and (c), should the same standard of necessity apply regardless of the union's conduct during negotiations concerning the proposal.

(b) Assuming the same standard does not apply, should a court preclude a union that it found failed to articulate in sufficient detail its objections to a debtor's proposal from challenging the necessity of any particular modification contained in that proposal, thereby relieving the debtor of its statutory burden of establishing such necessity.

3. Assuming that the same standard of "necessity" applies to a debtor's proposed modifications regardless of the union's

conduct during negotiations, may a debtor establish the necessity of its proposed modification to totally and permanently eliminate seniority from a collective bargaining agreement, by showing only that some intrusion into the seniority system is not inherently unreasonable and that it has a need for long-term flexibility.

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IN RE: ROYAL COMPOSING ROOM, INC.,

Debtor,

NEW YORK TYPOGRAPHICAL UNION NO. 6

Petitioner,

- against -

ROYAL COMPOSING ROOM, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York Typographical Union No. 6 ("Typo 6" or the "Union") hereby petitions for a writ of certiorari to enable this Court to review the judgment and opinion of the United States Court of Appeals for the

Second Circuit in In re Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988).[1]

OPINIONS BELOW

The opinion of the bankruptcy court granting the application of Royal Composing Room, Inc. ("Royal") to reject its collective bargaining agreement with Typo 6 is reported at 62 B.R. 403 (Bkrtcy. S.D.N.Y. 1986). The opinion is reproduced in the Appendix to this petition as Appendix C. (A. 44-110)[2]

The opinion of the district court affirming the opinion and order of the bankruptcy court is reported at 78 B.R. 671 (S.D.N.Y. 1987) and reproduced in the

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1. As indicated in the caption, the parties to this proceeding are petitioner New York Typographical Union No. 6 and respondent Royal Composing Room, Inc.

2. References to the Appendix are designated parenthetically as "A. __" followed by the page number(s) on which the referenced material appears.

Appendix to this petition as Appendix B. (A. 32-43)

The opinion of the court of appeals affirming the judgment of the district court is reported at 848 F.2d 345 (2d Cir. 1988) and reproduced in the Appendix to this petition as Appendix A. (A. 1-31)

JURISDICTION

On June 16, 1986 the bankruptcy court granted Royal's application to reject its collective bargaining agreement with Typo 6. The district court affirmed the bankruptcy court's opinion and order on September 29, 1987. The judgment of the court of appeals affirming the judgment of the district court was entered on May 27, 1988. (Appendix D at A. 111-12) A timely petition for rehearing with a suggestion for rehearing en banc was filed by the Union and subsequently denied by the court of appeals on August 8, 1988. (Appendix E

at A. 113-14) A timely application for an extension of time within which to file a petition for a writ of certiorari was made to this Court and was granted by Justice Marshall on October 26, 1988. This petition is filed within the time granted by Justice Marshall. (Appendix F at A. 115) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1113 of the Bankruptcy Code, 11 U.S.C. §1113, reads in pertinent part as follows:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
>
> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in

this section 'trustee' shall include a debtor in possession), shall -

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that -

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

** ** **

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms,

conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

STATEMENT OF THE CASE

Royal, one of the last unionized advertising typography shops in New York City, began to incur financial difficulties during the early 1980's. Royal Composing Room, 62 B.R. at 404, 411-412. (A. 44-46, 65-68) After seeking but failing to obtain substantial concessions in its labor agreement with Typo 6,[3] which has represented Royal's production employees since the company's inception, Royal filed

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3. The Union and its President, Bertram Powers, were instrumental in having Royal relieved from part of its obligation to contribute to the industry's Benefit and Productivity Fund, a fund established in 1975 to provide compensation and training to workers laid off as a result of the introduction of new technologies. Royal Composing Room, 62 B.R. at 408-09. (A. 58)

a Chapter 11 petition on March 14, 1986. Id. at 404, 408-409. (A. 45-46, 56-59)

Pursuant to §1113 of the bankruptcy code, the debtor in possession or the trustee (hereinafter referred to as the "employer") must, inter alia, make a proposal to a union to modify the parties' contract before applying to the bankruptcy court to reject its collective bargaining agreement. The proposal must be limited to "those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor" and must assure "that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . ." 11 U.S.C. §1113(b)(1)(A).

Royal made its preapplication proposal to the Union on March 18, 1986. Royal Composing Room, 848 F.2d at 347. (A. 4) Among the modifications proposed by Royal was the total elimination of priority -- or

seniority as it is known in most union contracts -- from its collective bargaining agreement with Typo 6. Id. at 349-50. (A. 11)

The very next day, on March 19, 1986, Royal filed an application with the bankruptcy court to reject its collective bargaining agreement with Typo 6.[4] Royal Composing Room, 62 B.R. at 404. (A. 46) In less than a week Royal had filed a Chapter 11 petition, proposed modifications to its contract with Typo 6, and applied to reject its collective bargaining agreement.[5]

After a hearing on Royal's application at which Royal failed to produce any specific evidence regarding its need to

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4. The bankruptcy court had jurisdiction to entertain this application pursuant to 28.U.S.C. §§151 and 1334(a) and (b).

5. On March 18 Royal also requested interim relief from its collective bargaining agreement which was not opposed by the Union. Royal Composing Room, 62 B.R. at 409. (A. 59)

totally and permanently eliminate priority,[6] see, e.g., Royal Composing Room, 848 F.2d at 356 (Feinberg, C.J. dissenting) (A. 26), the bankruptcy court found that Royal had satisfied the requirements of §1113 and granted Royal's application to reject its collective bargaining agreement with Typo 6. Royal Composing Room, 62 B.R. at 418. (A. 94)

Although the threshold requirement for rejecting a collective bargaining agreement pursuant to §1113, is that an employer make a proposal to a union that satisfies the necessity requirements of subsection (b)(1)(A), the bankruptcy court pointedly refused to make Royal's proposal the "first and foremost topic of consideration."

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6. Royal presented conclusory testimony that a limited intrusion into priority was needed so that five employees could be laid-off without regard to seniority. Royal, however, never proved, and the bankruptcy court never found, that laying off five employees out of seniority order was necessary for Royal to reorganize successfully.

Royal Composing Room, 62 B.R. 406-07. (A. 51-54) Instead, the bankruptcy court focused upon the parties negotiating behavior prior to May 8, the date on which the hearing concerning Royal's application to reject commenced. Id. at 407-411. (A. 53-65) According to the bankruptcy court, "[a] union must articulate and discuss in detail with a debtor during the prehearing negotiations its reasons for declining to accept the debtor's proposal in whole or in part." Id. at 407. (A. 54) After considering the Union's response to Royal's pre-Chapter 11 requests for relief (when Typo 6 concededly had no obligation to consider or negotiate over modifications in its contract), the limited negotiating sessions the parties held after Royal made its proposals but before the hearing commenced,[7] and the counterproposal made by

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7. Section 1113 provides that during the period "beginning on the date" of the employer's proposal to modify its

the Union on May 5, the bankruptcy court found that the Union's posture during negotiations was essentially a "stonewall." Id. at 407-411. (A. 54-65)

The bankruptcy court then held that "in the case of a stonewall" by a union during negotiations, when considering whether an employer's proposed modifications satisfied the necessity requirements of subsection (b)(1)(A), a court "must focus on the larger picture:

(footnote continued from previous page) collective bargaining agreement and "ending on the date of the hearing" held to consider the employer's application to reject, "the [employer] shall meet, at reasonable times, with the authorized representative [of its employees] to confer in good faith in attempting to reach mutually satisfactory modifications of [the collective bargaining agreement]." 11 U.S.C. §1113(b)(2).

After Royal made its proposal to modify its contract with Typo 6, the parties met for negotiations on three occasions before the hearing commenced on May 8: March 18, April 10, and April 17. In addition, on May 5 Typo 6 made a counterproposal which was rejected by Royal. Royal Composing Room, 62 B.R. at 409-10. (A. 58-61)

whether the Debtor has shown any necessity for modifications of the magnitude it proposed ...." Royal Composing Room, 62 B.R. at 41. (A. 63-65) Pursuant to that analysis of §1113, the bankruptcy court proceeded to find (i) "that Royal established its need for relief on the order of magnitude requested" in its proposal and (ii) "that a proposal providing for some intrusion on the priority system was not inherently unreasonable." Id. at 417-18. (A. 87-94)

The bankruptcy court also explicitly rejected the standard of necessity articulated by the Third Circuit in Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074 (3d Cir. 1986). The Third Circuit analyzed §1113's necessity requirements in terms of (i) how necessary the proposed modifications must be and (ii) what goal should be considered when evaluating the

necessity of an employer's proposed modifications. After a detailed analysis of the legislative history of §1113, the Third Circuit held that courts must define "necessary" as "essential" and evaluate the necessity of proposed modifications with reference to "the somewhat shorter term goal of preventing ... liquidation ... rather than the longer term issue of the debtor's ultimate future." Id. at 1081-83, 1086-89. Without any mention of the statute's legislative history, the bankruptcy court concluded that "essential" was too strict a standard and that the short term goal of preventing liquidation was too narrow a prospective from which to evaluate the necessity of an employer's proposed modifications. Royal Composing Room, 62 B.R. at 417-18. (A. 89-94)

Shortly after the bankruptcy court's decision in Royal Composing Room, the Second Circuit, in Truck Drivers Local 807

v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987), also explicitly rejected the Third Circuit's holding in Wheeling-Pittsburgh. After a limited analysis of §1113's legislative history, id. at 89, the court in Carey Transportation held that (i) "necessary" should not be equated with "essential" or "bare minimum" and (ii) that an employer's proposed modifications should be evaluated with reference to the longer term goal of successfully completing its reorganization.

> In sum, we conclude that the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.

Id. at 90.

After finding that the standard of necessity employed by the bankruptcy court in Royal Composing Room was "in substance" the standard adopted by the Second Circuit

in Carey Transportation, the district court held that the bankruptcy court's findings of fact were not clearly erroneous and affirmed its opinion and order. Royal Composing Room, 78 B.R. at 673-74. (A. 37-41)

Without any mention of §1113's legislative history, the Second Circuit affirmed the judgment of the district court on two alternative grounds. First, it held that because the Union had stonewalled and refused to negotiate until Royal's proposal to eliminate priority was taken off the table, Royal Composing Room, 848 F.2d at 349 (A. 9), the Union could not oppose rejection by challenging Royal's proposed modification regarding priority or any other particular modification as unnecessary to Royal's successful organization.

> Put simply, where a union refuses to negotiate in order to obtain a different combination of modifications, it may not challenge

> the particular combination, or any vital element, contained in the debtor's proposal. So long as the total quantum of savings is necessary under the Carey Transportation standard, the union may not prevent rejection by belatedly attacking a specific element.

Id. at 349. (A. 10) Having failed to negotiate with an employer concerning an unnecessary modification, a union can avoid rejection only by showing "that the part of the proposal it cannot accept was included by the employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise." Id. at 348. (A. 8)

Alternatively, the court of appeals held that even if Typo 6 were permitted to challenge Royal's proposed modification concerning priority, it "would conclude that Royal demonstrated that it was a 'necessary modification', as that term was defined in Carey Transportation." 848 F.2d

at 350. (A. 11) Although the bankruptcy court never made "an explicit finding as to the necessity for eliminating priority", the court of appeals found it implicit in the bankruptcy court's finding that Royal required "long-term flexibility." Id. at 350. (A. 12)

After a detailed analysis of the legislative history of §1113, 848 F.2d at 352-54 (Feinberg, C.J. dissenting) (A. 16-20), Chief Judge Feinberg dissented from the majority's opinion. He criticized the majority's first holding, which prevented Typo 6 from challenging the necessity of Royal's proposal to eliminate priority, as standing §1113 on its head by requiring a union to negotiate over terms "which by no stretch of the imagination can be called 'necessary'", even when an employer has failed to meet the statute's threshold requirement by making a proposal limited to "necessary modifications ... necessary to

permit the reorganization of the debtor." Id. at 354-56. (A. 21-25) Because of the importance of priority and the lack of any "specific, factual information proving that priority had to be totally and permanently eliminated", he also rejected the majority's alternative holding that the necessity of eliminating priority was established by the bankruptcy court's finding that Royal required maximum flexibility. Id. at 356-57. (A. 25-28) Based upon that approach, according to Chief Judge Feinberg, "almost any bankrupt company could eliminate seniority without proving any particularized need." Id. at 357. (A. 27)

REASONS FOR GRANTING THE PETITION

1. The most obvious reason for granting this petition is to resolve the clear conflict between the Second and Third Circuit Courts of Appeals regarding the

interpretation of §1113's necessity requirements. The Second Circuit's decision in Royal Composing Room was premised upon its earlier holding in Carey Transportation which explicitly considered and rejected the strict standard of necessity adopted by the Third Circuit in Wheeling-Pittsburgh. This conflict undermines the important goal of uniformity in federal labor policy as it relates to the regulation of collective bargaining, and requires employers and unions outside of the Second and Third Circuits to enter into delicate negotiations concerning the survival of a financially troubled enterprise, without a clear understanding of the basic ground rules of those negotiations.

2. Even if a conflict between these courts of appeals did not exist, the Second Circuit's holding in Royal Composing Room deviates so substantially from both the

language and the intent of §1113 and impinges upon such important federal labor policy considerations, that this Court ought to grant plenary review.

(a) The Second Circuit's initial holding, that a union may not challenge any aspect of an employer's proposal as unnecessary unless it first enters into negotiations with the employer, forces a union to negotiate with an employer over proposals that have only an attenuated relationship to the employer's successful reorganization but which are clearly anathema to the union. Not only does this holding ignore the language and structure of the statute and the intent of Congress, but by permitting employers to begin negotiations with offensive and unnecessary proposals, it encourages hostile negotiations and litigated solutions.

(b) The Second Circuit's alternative holding, that an employer's generalized

need for maximum flexibility is sufficient to establish the necessity for totally eliminating seniority, forces a union to accept the total elimination of seniority without requiring an employer to establish any particularized need, or face rejection of its entire collective bargaining agreement. Seniority has long been recognized as a cornerstone of American trade unionism by both Congress and this Court, see, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976), and no union should be forced to accept its total elimination simply because an employer has shown that flexibility will aid its reorganization.

I. THE COURT SHOULD GRANT THIS PETITION SO THAT IT MAY RESOLVE THE CONFLICT BETWEEN THE CIRCUITS REGARDING THE INTERPRETATION OF THE NECESSITY REQUIREMENTS OF SECTION 1113 OF THE BANKRUPTCY CODE

Before permitting an employer to reject its collective bargaining agreement pursuant to §1113, a court must find that "prior to filing an application seeking rejection of a collective bargaining agreement," the employer has made a proposal to the union which only "provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization ...." 11 U.S.C. §1113(b) and (c).

As noted above, there is a conflict between the Second and Third Circuits regarding how these necessity requirements should be construed. The Third Circuit has held that necessary should be defined as essential[8] and that the necessity of an

8. According to Webster's Ninth New Collegiate Dictionary "necessary" has the

employer's proposed modifications should be evaluated with reference to the short term goal of preventing the employer's liquidation. Wheeling-Pittsburgh, 791 F.2d at 1088-89. The Second Circuit explicitly rejected the Third Circuit's necessity standard and held that necessary should be defined as almost necessary, i.e. necessary, but not absolutely minimal, and that the necessity of an employer's proposed modifications should be evaluated with reference to the longer term goal of allowing the employer to reorganize successfully.[9] Carey Transportation, 816

(footnote continued from previous page) following meanings: an indispensable item; essential; of an inevitable nature; inescapable; compulsory; absolutely needed; and required.

9. Considering the long term perspective implicit in Royal's proposal to totally eliminate priority, and Royal's failure to present any specific evidence establishing the need to completely eliminate priority, it is fairly obvious that a court applying the standard of necessity adopted by the Third Circuit in Wheeling-Pittsburgh, would not have granted Royal's application to

F.2d at 88-90.[10] With the Second Circuit's opinion in the Royal case, this split with the Third Circuit has widened as Carey's standard has been shown to be so malleable as to permit employers to propose

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(footnote continued from previous page) reject its collective bargaining agreement with Typo 6.

10. The Carey Transportation court also argued that requiring an employer to propose essential modifications at the outset would make it virtually impossible for an employer to fulfill its statutory obligation to bargain with a union in good faith over its proposal. Carey Transportation, 816 F.2d at 89.

> Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.

Id.

This argument, however, ignores the fact that even after an employer proposes truly minimal changes in a collective bargaining agreement, it can still negotiate with a union over alternative modifications which would yield a similar amount in savings.

eliminating fundamental features of American collective bargaining agreements, such as seniority or arbitration, even though their elimination adds little to an employer's prospects of successfully reorganizing and mortally wounds a union and the employees it represents.[11]

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11. The holding in Wheeling-Pittsburgh is based upon an analysis of §1113's legislative history far more detailed than the cursory overview undertaken by the court in Carey Transportation. Compare Wheeling-Pittsburgh, 791 F.2d 1081-83, 1086-88 with Carey Transportation, 816 F.2d at 89. But however parsed, the legislative history cannot support the result in Royal as ultimately that history "reinforces what is implied by the statutory language itself: Congress intended section 1113 to make rejection of signed labor contracts difficult (but not impossible) and was especially concerned that bankruptcy not become a union-busting tool." Royal Composing Room, 848 F.2d at 352 (Feinberg, C.J. dissenting). (A. 15-16) Nonetheless the legislative history does not contain any committee reports which this Court has found to be the most reliable source for determining Congressional intent. See, e.g., Garcia v. United States, 469 U.S. 70, 76 (1984). Thus, notwithstanding that the sequence of legislative events clearly supports the Third Circuit's view of the statute, the legislative history is otherwise comprised primarily of individual commentary by Congressmen which, if taken

This conflict also undermines the important policy of uniformity in federal regulation of collective bargaining. Lower courts outside of the Second and Third Circuits have endorsed both approaches. See, e.g., In re Amherst Sparkle Market, Inc., 75 B.R. 847 (Bkrtcy. N.D. Oh. 1987) (adopting the Carey Transportation standard); In re Mile High Metal Systems, Inc., 67 B.R. 114 (D. Colo. 1986) (adopting the Wheeling-Pittsburgh standard). Employers and unions not within the Second and Third Circuits' jurisdiction must enter into the delicate negotiations required by §1113 without knowing which standard of

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(footnote continued from previous page)
out of context or considered in isolation, may be mistakenly viewed as evidence of a less restrictive Congressional intent. Accordingly, this Court should definitively reconcile the conflict between the Circuits rather than wait for further appellate authority which may rely on selective and unrepresentative citations to the legislative debates, as the bankruptcy court did below, to support an erroneous view of the statute.

necessity will be applied. For those who miscalculate the costs can be devastating: The rejection of a collective bargaining agreement or the liquidation of a financially troubled enterprise. Thus, clarification in this unsettled area is critical.

II. IN CONTRAVENTION OF CLEAR STATUTORY LANGUAGE, LEGISLATIVE HISTORY AND PRIOR JUDICIAL HOLDINGS, THE SECOND CIRCUIT ERRONEOUSLY PRECLUDED THE UNION FROM CHALLENGING THE NECESSITY OF ROYAL'S PROPOSAL TO TOTALLY ELIMINATE PRIORITY

The Second Circuit's holding in Royal Composing Room deviates so significantly from the statutory scheme developed by Congress that this Court ought to grant plenary review.

The Second Circuit held that where a union refuses to negotiate in order to obtain a different combination of modifications than those proposed by an

employer,[12] it may not oppose rejection by challenging a specific modification as unnecessary to the employer's successful reorganization. Royal Composing Room, 848 F.2d at 349. (A. 10) Having failed to negotiate with an employer concerning an unnecessary modification, a union, according to the Second Circuit, can avoid rejection only by showing "that the part of the proposal it cannot accept was included by the employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise." Id. at 348. (A. 8)

This holding contradicts the clear language and intent of §1113. First, it erroneously ignores the statutory

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12. Any suggestion by the majority that the Union totally failed to negotiate is not supported by the record. Although the bankruptcy court found that the Union "stonewalled" during negotiations, it also found that the parties engaged in limited negotiations. Royal Composing Room, 62 B.R. at 409-10.

requirement that the employer demonstrate that each of its proposed modifications is necessary for its reorganization. Second, it incorrectly embraces a shifting standard of necessity that looks to a union's negotiating record to determine what standard of necessity will be applied by a court in evaluating an employer's proposal. Third, it mistakenly permits unnecessary anti-union modifications to be part of court-approved proposals. Fourth, it improperly requires a union to show that a proposed modification was both unnecessary and made in bad faith, when Congress clearly placed the burden on employers to prove that their proposed modifications were necessary and rejected without good cause. Fifth, it inappropriately discourages negotiated settlements and encourages litigation by permitting employers to set the stage for negotiations with proposed modifications that bear

little relation to an employer's successful reorganization but which are anathema to most unions.

1. Notwithstanding the Second Circuit's holding to the contrary, §1113 requires courts to evaluate the necessity of the modifications proposed by an employer rather than the necessity of the proposal as a whole. The employer is required to make a proposal "which provides for those necessary modifications ... necessary to permit the reorganization of the debtor." 11 U.S.C. §1113(b)(1)(A). If Congress had only intended to require a employer to establish the necessity of its proposal as a whole, it would not have explicitly required that the proposal consist of "necessary modifications."

The statute's legislative history is replete with references to the requirement that the employer only propose necessary modifications. As noted by Senator

Packwood, "only modifications which are necessary to a successful reorganization may be proposed" by an employer. See 130 CONG. REC. S8898 (daily ed. June 29, 1984). As explained by Representative Morrison, the author of the language eventually adopted by Congress, "the trustee must limit his proposal to modify a collective bargaining agreement to only those modifications that must be accomplished if the reorganization is to succeed." Id. at H7496.[13] Nowhere in the statute's legislative history is it suggested that unnecessary modifications may be part of an employer's proposal, so long as the proposal as a whole is necessary for the employer's successful reorganization.

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13. The Morrison explanation was introduced in written form in the Senate during that body's consideration of the conference committee's report. See 130 CONG. REC. S8899 (daily ed. June 29, 1984) (Sen. Kennedy).

Ignoring the necessity of an employer's proposed modifications also conflicts with prior decisions by other courts. Other than the Royal line of cases, petitioner is aware of no decisions in which a court has refused to evaluate the necessity of an employer's proposed modifications, even when a union has failed to engage meaningfully in negotiations. See, e.g., Carey Transportation, 816 F.2d 82 (2d Cir. 1987); In re Mile High Metal Systems, Inc., 67 B.R. 114 (D. Colo. 1986).

2. The Second Circuit's approach also erroneously endorses a shifting standard of necessity based upon a court's evaluation of a union's negotiating record: focusing on the individual modifications if the union engages in meaningful negotiations and on the proposal as a whole if it does not. The statute, however, has only one necessity standard and provides no basis upon which to conclude that a union's

negotiating posture should govern the definition or application of that standard. Moreover, by requiring courts to evaluate proposed modifications made by a debtor "[s]ubsequent to filing a petition [for bankruptcy] and prior to filing an application seeking rejection of a collective bargaining agreement," 11 U.S.C. §1113(b)(1), it is evident that Congress intended courts to evaluate the necessity of an employer's proposed modifications independently of the post-application negotiations relied upon so heavily by the Second Circuit.[14]

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14. Even if the statute could be construed as permitting a court to consider a union's post-petition, pre-application negotiating posture when evaluating the necessity of an employer's proposed modifications, here the employer gave the Union no time to negotiate before applying to reject its collective bargaining agreement. Royal made its proposal on March 18 and filed its previously prepared application for rejection the very next day. See Royal Composing Room, 848 F.2d at 354 n. 2 (Feinberg, C.J., dissenting). (A. 22)

If the application of the statute's

Although the statute does require employers to negotiate with employee representatives, see §1113(b)(2), nowhere does it obligate a union to negotiate regardless of the employer's proposed modifications. In fact, the opposite is true. As noted by Chief Judge Feinberg in dissent:

> [T]he point of the requirement that the proposal contain only "necessary" modifications is to limit when a union can be required to reopen and renegotiate an already signed contract.
>
> In contrast, the majority requires unions to negotiate over terms that save nothing -- which by no stretch of the imagination can be called "necessary" -- even though those terms mortally wound the union, because

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(footnote continued from previous page) necessity and good cause standards are both going to be dependent upon a union's negotiating posture, then the employer ought to be required to give the union an opportunity to negotiate before taking the inflammatory step of attempting to abrogate the contract completely. See Carey Transportation, 816 F.2d at 92 (analysis of good cause provision which "adds nothing to other substantive requirements of the statute", proper where a union has not participated meaningfully in post-petition negotiations).

> refusal to negotiate over a specific term bars the union from objecting to that term at the subsequent rejection hearing.

Royal Composing Room, 848 F.2d at 354 n. 2 (Feinberg, C.J., dissenting). (A. 22-23)

Moreover, the Second Circuit's refusal to consider the necessity of an employer's proposed modifications independently of a union's post-application negotiating posture, represents yet another departure from the approach to §1113 taken by other courts. Except for the Royal line of cases, petitioner is aware of no decisions in which an employer's proposal was evaluated with reference to a union's stance in negotiations. Even prior Second Circuit decisions held that the first issue a court must address in considering an employer's rejection application is whether the employer's proposed modifications satisfied the statute's necessity requirements. See Carey Transportation,

816 F.2d at 88; In re Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir.), cert. denied, __ U.S. __, 107 S.Ct. 433, 93 L.Ed.2d 383 (1986). As stated by the court in Mile High Metal Systems:

> [The approach adopted by the bankruptcy court in Royal Composing Room] is directly contrary to the mandate of the statute, which makes it incumbent upon a debtor to make a proposal which meets all of the requirements of the Code.

67 B.R. at 118-19.

3. By prohibiting a union which has failed to negotiate to a court's satisfaction from challenging an employer's proposed modifications, the majority also inappropriately permits unnecessary anti-union modifications to be part of court-approved proposals. As noted by Chief Judge Feinberg in dissent, the majority's statutory interpretation thereby undercuts Congressional intent and ignores prior Second Circuit holdings.

> The majority thus allows individual anti-union modifications that save

> management little to lurk in court-approved proposals. The majority thereby disrupts the scheme of section 1113, since it effectively eliminates the word "necessary" from subsection (b)(1)(A) and leaves only the good faith and balance of the equities clauses to protect the union. This was not the result Congress intended when it overruled Bildisco, which said that only balancing the equities was required. The majority's rule also violates Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987), in which we held that a management proposal must be limited to "necessary, but not absolutely minimal" modifications, since under the majority's rule, even modifications that do not significantly help the reorganization are permitted.

Royal Composing Room, 848 F.2d at 355 (Feinberg, C.J. dissenting). (A. 24)

4. The majority's attempt to ameliorate this flaw in its analysis by giving unions the opportunity to prove that an unnecessary modification was proposed by an "employer in bad faith, in an effort to stalemate negotiations and allow it to obtain outright rejection rather than a negotiated compromise," 848 F.2d at 348 (A.

8), only widens its departure from the statutory scheme enacted by Congress and the prior holdings of numerous other courts. The statute and the case law clearly require the employer to shoulder the burden of proving that its proposal contained only necessary modifications, that the union refused to accept its proposal without good cause and that the balance of equities favors rejection of the contract. See, e.g., Carey Transportation, 816 F.2d at 88; Century Brass, 795 F.2d at 276. Nowhere does the statute require the union to prove bad faith on the part of the employer. To require a union to show that a modification was both unnecessary and proposed in bad faith totally distorts the balance struck by Congress when, in reaction to N.L.R.B. v. Bildisco, 465 U.S. 513 (1984), it made it more difficult for

employers to reject their collective bargaining agreements.[15]

5. The Second Circuit implicitly seeks to justify its departure from the literal language of §1113, the statute's legislative history and the prior holdings of other courts, by relying upon the intent of Congress to encourage negotiated settlements between employers and unions rather than litigated solutions that result in the rejection of collective bargaining agreements. Royal Composing Room, 848 F.2d at 349. See also Royal Composing Room, 62 B.R. at 405-06, 411 ("In addition to the legislative intent discussed previously, both equity and conservation of judicial resources favor an interpretation of Code

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15. Moreover, as noted by Chief Judge Feinberg in dissent, "management may make a good-faith mistake in thinking its proposal is necessary. The good-faith provisions therefore do not substitute for the necessity requirement." Royal Composing Room, 848 F.2d at 355 (Feinberg, C.J. dissenting). (A. 24)

§1113(c) that promotes effective pre-hearing negotiations."). (A. 47-52, 64-65) Yet the approach adopted by the Second Circuit actually undermines this goal. By encouraging employers to enter into negotiations by proposing modifications that are offensive to any union even though they bear little relation to an employer's successful reorganization, the Second Circuit's holding will more often than not lead to hostile negotiations, deadlock, and the necessity for court intravention. Such an approach undermines the statutory scheme developed by Congress to discourage litigation and encourage negotiated solutions.

In §1113 Congress balanced the need of employers for quick and permanent relief from aspects of their collective bargaining agreements with the federal policy favoring negotiated settlements in collective bargaining rather than government mandated

solutions. It did so by requiring employers to propose modifications in their union contracts and negotiate in good faith with unions over those modifications, but then limiting the time period during which employers must negotiate before obtaining permanent judicially approved relief. In most cases, the period of required negotiations need only last fifteen days.[16]

Critical to this scheme is the statutory requirement that employers begin negotiations with narrowly tailored

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16. An employer is permitted to apply for rejection of a collective bargaining agreement immediately after making its proposal to a union, just as Royal did here. 11 U.S.C. §1113(b)(1). Once a hearing commences on the employer's application to reject, the employer's obligation to negotiate in good faith ends. 11 U.S.C. §1113(b)(2). In most cases the hearing must begin within fourteen days after the employer files its application to reject. 11 U.S.C. §1113(d)(1). The court may delay the hearing for an additional seven days, "where the circumstances of the case, and the interests of justice require." Id. After that additional seven days, however, the hearing may be delayed only if the employer and the union agree to do so. Id.

proposals. By requiring employers to limit their proposals to "necessary modifications ... necessary to permit the reorganization of the debtor," Congress attempted to assure the success of this short period for negotiations by preventing employers from using bankruptcy as a tool to rewrite collective bargaining agreements in ways that would undermine the entire collective bargaining relationship while adding little to the prospects of a successful reorganization. Thus, the statutory limits on the scope of the employer's proposal serve to prevent negotiations from immediately becoming deadlocked, as they did here, over modifications which are offensive to the union but which contribute little to an employer's successful reorganization.

The approach to §1113 adopted by the Second Circuit, however, totally undermines this statutory scheme. It permits

employers to propose offensive, unnecessary modifications which quickly lead to deadlock, as Royal's proposal on priority did here, thereby discouraging negotiated settlements and promoting litigation.

III. THE MAJORITY'S HOLDING THAT ROYAL DEMONSTRATED THAT ITS PROPOSAL TO TOTALLY ELIMINATE PRIORITY WAS A "NECESSARY MODIFICATION" ERRONEOUSLY PERMITS ALMOST ANY BANKRUPT COMPANY TO ELIMINATE SENIORITY WITHOUT ESTABLISHING ANY PARTICULARIZED NEED AND THEREFORE INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE IN FEDERAL LABOR LAW

Priority -- called seniority in most union contracts -- has become one of the chief cornerstones of American trade unionism. Seniority is often the only equity workers have in a company and it is one of the chief protections workers have from arbitrary management decision making. Seniority prevents the indiscriminate denial of employment by dictating that layoffs and recalls to work be accomplished

in seniority order. Only seniority assures an employee that after twenty or thirty years of loyal service, he will not be replaced by a newly hired employee.[17] As the Supreme Court has said, "'[m]ore than any other provision of the collective bargaining agreement ... seniority affects the economic security of the individual employee covered by its terms.'"[18] Franks v. Bowman Transportation Co., 424 U.S. 747, 766 (1976).

Notwithstanding the importance of seniority principles in general and to the

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17. "[Seniority] is so important that the union president in this case said he was willing to 'take whatever wage cut is necessary to keep this firm in business, but I don't think we should be asked to give up [seniority] for that purpose.'" Royal Composing Room, 848 F.2d at 356 (Feinberg, C.J. dissenting). (A. 25-26)

18. The need for this protection is best illustrated by Royal's conduct. Although professing a need to layoff only five employees, within a week of the bankruptcy court's decision, Royal terminated (without recall rights) 18 of its 32 union employees.

Union here in particular, see Royal Composing Room, 848 F.2d at 356, (Feinberg, C.J., dissenting), (A. 25-26) Royal proposed the total elimination of priority. Even assuming, arguendo, that Royal presented sufficient evidence of a need to layoff five employees without regard to priority, it presented absolutely no evidence that it needed to ignore priority when making future layoffs or when rehiring or recalling employees during its reorganization. Id. (A. id.) In short, Royal presented no evidence supporting the necessity of its proposal to totally eliminate priority.

The only factual finding explicitly made by the bankruptcy court concerning the necessity of Royal's proposal to eliminate priority, was the observation that "a proposal providing for some intrusion on the priority system was not inherently unreasonable." Royal Composing Room, 62

Bankr. at 417. (A. 87-88) This, however, as the Second Circuit admits, did not constitute "an explicit finding as to the necessity for eliminating priority." Royal Composing Room, 848 F.2d at 350. (A. 11) The bankruptcy court applied a standard of reasonableness rather than a standard of necessity and, in any event, did not address the employer's proposal to totally eliminate priority.

Nevertheless, the Second Circuit held that since the bankruptcy court found that Royal required maximum flexibility, it implicitly found that Royal's proposal to totally eliminate priority was necessary for its successful reorganization.

> Thus, the bankruptcy court began with the conclusion that priority was not off-limits, because changes in priority "are not inherently unreasonable."
>
> But the bankruptcy court did not stop there. It went on to explain the need to eliminate, rather than merely modify, priority, in terms of Royal's need for flexibility in assignments and lay-offs. Judge Abram wrote, "The

> Debtor will in the future be faced with enormous competitive pressure which will require it to have maximum flexibility, including with respect to utilization of its unionized labor, in order to mold and adapt in a changing business environment."

Royal Composing Room, 848 F.2d at 350. (A. 12) Nor did it trouble the court of appeals that, as Chief Judge Feinberg observed, "there was no specific, factual information proving that priority had to be totally and permanently eliminated." Id. at 356 (Feinberg, C.J., dissenting). (A. 26) Having a need for flexibility was deemed sufficient by the majority to establish the necessity of totally eliminating priority.

> As Judge Abram noted, "Projections are necessarily speculations about the future and are an art, rather than a science." ... We will not hold Royal to show the necessity of every conceivable future use of the flexibility it now requires; it is enough that the bankruptcy court found it needs that flexibility.

Id. at 350. (A. 13)

As noted by Chief Judge Feinberg in dissent, however, truisms concerning

management's need for flexibility and the speculative nature of future projections do not constitute the evidence of necessity required by §1113. Royal Composing Room, 848 F.2d at 356-57 (Feinberg, C.J., dissenting). (A. 26-28) Seniority is so important to trade unions that demonstrating the necessity of its total elimination requires a stronger showing than that made here by Royal. Id. (Feinberg, C.J., dissenting). (A. 25-28) Indeed, under the reasoning endorsed by the Second Circuit, almost any bankrupt company could justify totally eliminating seniority without showing any particularized need to do so. Unions would thus be forced to accept the total elimination of seniority or face the prospect of an employer being permitted to reject the entire collective bargaining agreement. That, however, was not the intent of Congress when it enacted the strict requirements of §1113.

The [bankruptcy court's] first finding -- that "some intrusion on the priority system was not inherently unreasonable" -- does not even approach a finding that total elimination of priority is necessary. The second statement -- about the "enormous competitive pressure" requiring "maximum flexibility" -- is so general as to be meaningless. It could be said of any bankrupt company, since presumably a company would not be bankrupt without "enormous competitive pressure" and since management always wants to have "maximum flexibility." Indeed, one of a union's key functions is to decrease management's flexibility by giving workers a role in their own work, and increasing flexibility is often code for ending unionization. Similarly, under the bankruptcy court's reasoning, almost any bankrupt company could eliminate seniority without proving any particularized need. Congress did not intend Section 1113 to be management's tool for eliminating seniority provisions. Instead, Congress required the employer to prove specific facts showing that the specific relief requested is necessary in its particular circumstances. On this record, the employer never met its burden, the bankruptcy court applied the wrong standard and, in any event, did not make particularized findings. At the very least, I would remand for further factual findings.

Id. at 357. (A. 27-28)

Thus, the Second Circuit's opinion can only encourage what occurred here: without a showing of particularized need, an employer was able to permanently discharge 18 of its 32 union employees, leaving them without even their seniority right to be recalled in the event their employer successfully reorganized. Plainly, this result turns the statute on its head and leads to the very union-busting tactics section 1113 was designed to prevent.

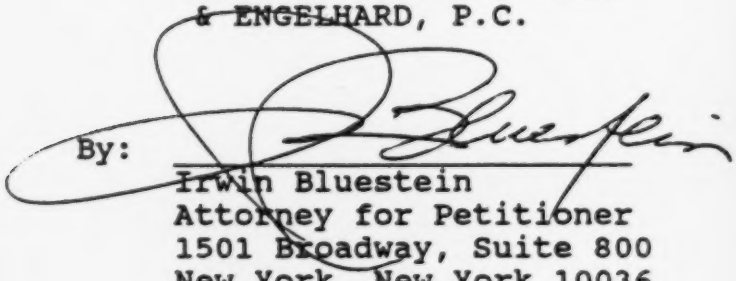
CONCLUSION

For all of the reasons provided above, this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 5, 1988

Respectfully submitted,

VLADECK, WALDMAN, ELIAS
& ENGELHARD, P.C.



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